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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 202

BURNHAM CHEMICAL COMPANY, a Corporation,
Petitioner,

v.

OSCAR L. CHAPMAN, Secretary of the Interior, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

ELDEN MCFARLAND,
618 Southern Building,
Washington 5, D. C.

Of Counsel:

J. FRED MCCLERKIN,
618 Southern Building,
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Burnham Chemical Company, a Nevada corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled cause on March 6, 1950, affirming the decision of the United States District Court for the District of Columbia.

OPINIONS BELOW.

The opinion of the District Court (R. 113-122) is reported in 81 F. Supp. 911. The opinion of the Court of Appeals (R. 235) is reported in 181 F. 2d 288.

JURISDICTION.

The judgment of the Court of Appeals was entered March 6, 1950. Rehearing was denied April 20, 1950 (R. 237). The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, U. S. Code (Sec. 240(a) of the Judicial Code as amended by the Act of June 25, 1948, c. 646, 62 Stat. 928).

QUESTIONS PRESENTED.

1. Whether, having two concurrent methods of administrative review covering the same issue, it is necessary to pursue and exhaust both methods as a prerequisite to maintaining a proceeding in court with respect thereto; and

2. Whether an order should issue requiring respondents to reinstate petitioner's applications for sodium prospecting permit and for sodium lease, and to consider such applications upon the basis of the controlling statutes and regulations applicable thereto.

STATUTES AND REGULATIONS INVOLVED.

Sec. 23 of the Leasing Act of February 25, 1920, c. 85, 41 Stat. 447, provided:

> "That the Secretary of the Interior is hereby authorized *and directed*, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium *dissolved in and soluble in water, and accumulated by concentration*, in lands belonging to the United States for a period of not exceeding two years: Provided, That the area to be included in such a permit shall be not exceeding two thousand five hundred and sixty acres of land in reasonably compact form * * *." (Italics added)

By Act of December 11, 1928 (c. 19, 45 Stat. 1019, Section 261, Title 30, U. S. C.) the foregoing section was amended by deleting the italicized words.

Section 24 of the same Act provided:

> "That upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one of the substances enumerated in section 23 hereof has been discovered by the permittee within the area covered by his permit and that such land is chiefly valuable therefor the permittee shall be entitled to a lease for one-half of the land embraced in the prospecting permit, at a royalty of not less than one-eighth of the amount or value of the production, to be taken and described by legal subdivisions of the public-land surveys, or if the land be not surveyed by survey executed at the cost of the permittee in accordance with the rules and regulations to be prescribed by the Secretary of the Interior. The permittee shall also have the preference right to lease the remainder of the lands embraced within the limits of his permit at a royalty of not less than one-eighth of the amount or value of the production to be fixed by the Secretary of the Interior. Lands known to contain such valuable deposits as are enumerated in section 23 hereof and not covered by permits or leases, except such lands as are situated in said county of San Bernardino, shall be held subject to lease, and may be leased by the Secretary of the Interior through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, and in such areas as he shall fix, not exceeding two thousand five hundred and sixty acres; all leases to be conditioned upon the payment by the lessee of such royalty of not less than one-eighth of the amount or value of the production as may be fixed in the lease, * * * "

By Act of December 11, 1928 (c. 19, 45 Stat. 1019, Sec. 262, Title 30, USC) the foregoing section was amended (to its present form) by changing the royalty and rental rates and deleting the reference to San Bernardino County.

Regulations.

The applicable regulations are set forth at pages 4 et seq. of the Record.

STATEMENT.

This proceeding involves a ten-acre area of Mojave Desert land known as "Little Placer" and located in the Kramer District of Kern County, California.[1] On June 1, 1928, petitioner, Burnham Chemical Company, filed an application for a sodium prospecting permit under section 23 of the Leasing Act of February 25, 1920.[2] Although the area was favorable for prospecting for sodium borates referred to in the Act (R. 186, 230) it was not known whether Little Placer actually contained such deposits (R. 66, 185); nor was it known whether such deposits, if any, were formed by the particular geological process prescribed by Sec. 23, namely, "accumulated by concentration".

A drilling on Little Placer, completed September 2, 1927, to a depth of 907 feet, had disclosed no sodium borates (R. 50, 213). However, in 1927 sodium borates in the form of tincal and kernite[3] had been discovered at "Western" in two drillings, one 110 feet south of Little Placer and the other 206 feet southwest of Little Placer, both at a depth of about 800 feet (R. 31, 46). Also sodium borate (tincal) had been discovered in 1926 at "Suckow", about one mile northwest of Little Placer, at a depth of 350 feet, and in 1925 tincal and in 1926 kernite had been discovered at "Baker" one-half mile northeast of Little Placer at a depth of 400 feet (R. 46, 59, 75). But a hole drilled to a depth of 605 feet half way between Baker and Little Placer had disclosed no sodium borates (R. 213), and numerous other drillings in the vicinity were negative (R. 213, 101). Prior to the discoveries referred to above, all known deposits of sodium

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[1] Technically described as the SW¼ of the SW¼ of the NE¼ of Section 24, Township 11 N., Range 8W, S.B.M.

[2] C. 85, 41 Stat. 447; see Sec. 261, Title 30, USCA.

[3] Kernite, named from "Kern" County where it was first discovered at Baker in 1926, $Na_2B_4O_7$. 4 H_2O is a dehydrated form of tincal $Na_2B_4O_7$. 10 H_2O (R. 64). The only known deposits of kernite in the world are at Baker and Western; and the geological knowledge concerning its characteristics and the source or manner of its deposition were, at that time embryonic (R. 101-2, 40, 75, 78).

borates had been surface deposits of tincal in dried up lake beds.

In 1926 the U. S. Geological Survey published Bulletin No. 785-C referring to this area and stating:

> "The records just given, though incomplete, show that the borate deposits are extremely irregular in form and distribution, being present in the shale at some places and absent at others near by, and that the structure of the Tertiary rocks within which they lie is exceedingly complex. It is evident, therefore, that the occurrence of a borate deposit beneath any given spot in the alluvium that mantles the district is utterly unpredictable, and that the limits of the deposits can be determined only by underground exploration." (Exhibit No. 4, R. 14, 95, 140, 185.)
>
> (See also R. 102, 213, 214, 78, 141, to the same effect.)

Eminent geologists of that day, including Dr. F. L. Ransome, consulting geologist, professor of economic geology, California Institute of Technology, Pasadena, California, Dean Frank H. Probert, Dean of the College of Mining of the University of California, Hoyt S. Gale, the geologist, formerly with the United States Geological Survey, who in 1927 suggested the name "Kernite" for the newly discovered borate (R. 96); Joseph Jensen, geologist and mining engineer, assistant professor of mining at Carnegie Institute of Technology, Pittsburgh, Pa., and Samuel E. Guthrey, mining engineer and mineral inspector for the U. S. Land Office, were of the opinion

> "that it would be impractical to classify any lands in the district as known to contain tincal and kernite without discovery; and that such classification based upon discovery on other lands would not be justified",

inasmuch as the subsurface deposits had only been found in lenses, disconnected and irregular, and without surface indication of the presence thereof (R. 102-5). On June 1, 1928, when petitioner filed its application for sodium prospecting permit it was not known by what process of nature

the sodium borates in either of the three known deposits had been formed.

With knowledge of this factual setting, the then Commissioner of the General Land Office, Department of the Interior, in a ruling letter dated November 23, 1928, determined (1) that Little Placer was known to contain valuable deposits of sodium borates dissolved in and soluble in water, and accumulated by concentration (2) that Little Placer was therefore subject to lease under section 24 of the Leasing Act rather than subject to prospecting permit under section 23 and (3) that petitioner's application for prospecting permit was rejected and such rejection would become final unless petitioner appealed such ruling within 30 days of notice (R. 228).

Meanwhile, on August 1, 1928, United States Borax Company filed an application for issuance to it of a patent on Little Placer under the mining laws [4] (R. 229). Its application was based upon a mining location made in 1926, and upon discovery of colemanite or calcium borate (a mineral covered by the mining laws but not included in the Leasing Act (R. 57)). This location together with the application based thereon was actually void *ab initio* because there was outstanding at the time of location an oil and gas prospecting permit issued to one Ray M. Smith [5] (R. 156; U. S. Borax Co., 58 I.D. 426 at pages 443-444).[6] But because of his failure to note this fact disclosed by his own records, the Commissioner treated the United States Borax Company application as *prima facie* valid (R. 229). It was not until July 31, 1944, that this fact and the resulting invalidity *ab initio* was brought to light (58 I.D. 426, 443).

On August 24, 1928 (R. 202), United States Borax Company protested the prospecting application of Burnham Chemical Company, petitioner herein; and in the same ruling letter of November 23, 1928, referred to above, the

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[4] Sec. 29, Title 30, U.S.C.

[5] This permit issued to Ray M. Smith was cancelled May 10, 1927.

[6] *Wilbur* v. *Krushnic,* 280 U.S. 306, 314; 50 L.D. 650, 651.

Commissioner ordered a contest hearing between petitioner, on its prospecting permit application under section 23 of the Leasing Act and United States Borax Company on its application for patent under the mining laws—both applications covering Little Placer—in order to determine (1) whether Little Placer "is valuable for sodium in any of the forms described in the leasing act of February 25, 1920" and (2) so known at the date of the United States Borax Company's mining location (R. 231). The letter also required the Government to be represented at the contest hearing, which it was, appearing as intervenor (R. 99, 227).

As pointed out above the letter had first stated that Little Placer contained sodium borates and was subject to lease only. Thus the Commissioner, in the same letter, first determined that Little Placer contained sodium borates in the forms described in Sec. 23 of the Act and then ordered a contest proceeding to redetermine that very fact (R. 227, 228, 231).

Petitioner was thereby presented in the same ruling-letter with two concurrent procedural avenues for administrative determination of the same basically controlling factor, namely, whether Little Placer was "known to contain" valuable deposits of sodium in any of the forms described in section 23 of the Leasing Act of February 25, 1920; one avenue being to appeal the rejection of the application for prospecting permit, and the other being to prosecute the contest proceeding raised by the U. S. Borax Co. protest.

On January 14, 1929, petitioner filed an application for lease of Little Placer under Section 24 of the Leasing Act of February 25, 1920 (R. 232), but did not appeal that portion of the Commissioner's determination denying the application for prospecting permit. This lease application was incorporated as an issue in the contest proceeding along with petitioner's application for prospecting permit.

Hearing on the contest lasting 30 days was had before the Land Office Register at Los Angeles in June and July, 1929, Burnham Chemical Company being required to carry the

burden of proof. The decision of the Register was announced February 12, 1931 holding that Little Placer was not known to contain sodium in any of the forms described in the leasing act and that a patent should issue to the U. S. Borax Company. Petitioner appealed and the Commissioner of the General Land Office affirmed the decision April 21, 1932, stating:

> "045676 is held for rejection subject to contestant's right to appeal to the Secretary of the Interior within 30 days from notice" (R. 215).

045676 was petitioner's prospecting permit application covering Little Placer. (R. 206).

Petitioner duly appealed to the Secretary of the Interior who, on March 8, 1933, affirmed the decisions of the Register and Commissioner, *finally denied petitioner's respective applications for prospecting permit* and for lease on Little Placer, and ordered the patent to issue to U. S. Borax Company (R. 97, 51-52).*

In 1935 the Solicitor of the Department of the Interior recommended further investigation of United States Borax Company's claims to Little Placer, (the patent although ordered to be issued, not actually having issued) with a view toward reopening the prior contest proceeding (R. 225). As a result of that investigation the Secretary of the Interior, on May 19, 1937, instigated administrative proceedings to reopen the issue determined in the prior contest (R. 30, 54). This proceeding, however, was brought against the Borax Company only, without notice to petitioner and without reinstating petitioner as an interested party, despite petitioner's repeated requests for reinstatement.

Respondent, Commissioner Fred Johnson, held on November 21, 1941, that the Borax Company entry on Little

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* The Secretary said: "The Commissioner accordingly affirmed the register's decision and held the *permit application* of the Burnham Chemical Company for rejection, from which holding Burnham Chemical Company has appealed." 54 I. D. 183 at p. 185. (Italics added).

Placer was subject to cancellation. This decision was affirmed on appeal to the Secretary, in April, 1943; and on July 31, 1944, respondent Oscar L. Chapman denied motions for rehearing and reopening (R. 98) stating among other reasons that because of the existence of an oil and gas prospecting permit on Little Placer at the time of the Borax Company's attempted location thereon (which oil and gas prospecting permit was subsequently cancelled (R. 156)) the Little Placer claim of the Borax Company "was void from its inception" (58 I.D. 426, at p. 444).

Respondents then brought suit in the United States District Court for the Northern District of California against United States Borax Company and on August 16, 1945, a final decree was entered therein perpetually enjoining United States Borax Company from asserting or acquiring any interest in or claim to Little Placer by patent, purchase, lease or otherwise and requiring the execution of a quit claim deed thereto to the United States (R. 68).

Meanwhile, immediately upon hearing of the reopening of the determination arrived at in petitioner's contest with the Borax Company, petitioner on October 15, 1937, filed with respondents an application for reinstatement of its applications for prospecting permit and sodium lease on Little Placer (R. 97, 180). No action having been taken thereon, petitioner on May 11, 1939, requested that action be taken (R. 97). On September 18, 1945, petitioner again requested action on its application (R. 98). On June 18, 1946, respondents rejected petitioner's application for reinstatement of its applications for prospecting permit and lease (R. 98). Petitioner's appeal to the Secretary was rejected January 22, 1947, and petitioner's petition for rehearing was rejected February 24, 1947 (R. 98), respondent Chapman stating that by failing to appeal in 1928, petitioner had acquiesced in the rejection of its application for prospecting permit (R. 111). On April 14, 1947, this suit was filed.

The trial court held (1) that petitioner is precluded from maintaining this proceeding with respect to its application

for prospecting permit because it had failed to exhaust its administrative remedy with respect thereto (R. 114),[7] and (2) that petitioner is not entitled to a prospecting permit because no reason appears for setting aside the action of the Secretary in holding that the lands are subject to disposition by lease under section 24 of the Leasing Act rather than by prospecting permit under section 23 (R. 122); and (3) that petitioner is not entitled to a lease because the right to issue leases is confided in the Secretary's discretion and is not mandatory (R. 122).

The Court of Appeals affirmed the decision below *per curiam*, adopting the trial court's opinion by reference thereto (R. 235).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that petitioner is precluded from maintaining this action "by failure to exhaust its administrative remedies".
2. In holding that respondents and their respective predecessors in office did not err either in law or in the exercise of their discretion in holding that Little Placer, in 1928, was "known to contain valuable deposits" of sodium borates accumulated by concentration, within the meaning of section 24 of the Leasing Act of February 25, 1920.
3. In holding that respondents did not abuse their discretion when, having reopened the prior contest proceeding as to United States Borax Company, they refused to reopen said proceeding as to petitioner and refused to reinstate petitioner's applications, covering Little Placer.

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[7] The court said: "The proceeding terminated insofar as the plaintiff's application for a prospecting permit was concerned, on February 9, 1929, by denial of plaintiff's application." (R. 114)

4. In holding that petitioner's application for lease of Little Placer should be administered in accordance with the respondents' regulations adopted in 1935 (requiring competitive bidding) rather than in accordance with respondents' regulations in effect at the time of filing petitioner's application for lease in 1929 (which regulations did not require competitive bidding).

5. In failing to hold that after the interest and claims of United States Borax Co. had been finally determined to be void *ab initio,* petitioner's applications should be reconsidered by respondents on the same basis as they would have been considered in 1928 and 1929, respectively, had such determination been made at the time of the filing of petitioner's applications.

REASONS FOR GRANTING THE WRIT.

1. (a) The statutory provisions herein involved have not previously been construed by this Court. (b) The questions are of general importance because they affect the future discovery and development of borax deposits in the area from which more than 97 per cent of the world's supply of borax is now being mined, and the administration of the statute applicable thereto. (c) It is unlikely that a conflict between circuits will ever arise, because the cause of action grows out of administrative determinations and interpretations of law made, and which by their nature will continue to be made, in the District of Columbia.

2. This case presents an important question of administrative law, namely, whether having two concurrent methods of administrative review covering the same issue, it is necessary to pursue and exhaust both methods as a prerequisite to maintaining a proceeding in court with respect thereto.

The rule is well settled that failure to exhaust an available administrative remedy normally precludes judicial relief

from an administrative determination.[8] Petitioner, in the present case, was presented in the same notice and ruling letter with two concurrent avenues or methods for administrative appeal of the same issue, namely, whether its application for prospecting permit should be granted (R. 231). It did not appeal the determination denying the application. Instead (1) it filed an application for a lease and (2) it attacked that determination in the contest proceeding against U. S. Borax Co., the government appearing therein as intervenor (R. 227, 99, 51). The application for lease was then consolidated as an issue in the contest proceeding (R. 99). The only ultimate issues decided in that contest, so far as petitioner was concerned, were whether its applications for prospecting permit (045676) and for lease would be granted or rejected; and the order with respect to petitioner issued therein by the Commissioner was "045676 is held for rejection subject to contestant's right of appeal to the Secretary of the Interior within 30 days from notice." (R. 215.) Petitioner duly appealed to the Secretary (R. 97) and the Secretary affirmed the Commissioner's decision on March 8, 1933. Petitioner not only exhausted its administrative remedy but after the Secretary reopened his determination it promptly applied for administrative reinstatement on October 15, 1937 (R. 97, 180), on May 11, 1939 (R. 97), on Sept. 18, 1945 (R. 98), and February 17, 1947 (R. 98).

Although the Commissioner rejected petitioner's application for permit on February 9, 1929 (R. 99), he subsequently specifically recognized the pendency of that application in his order of April 21, 1932 (R. 206), and the Secretary did likewise in his affirmance on March 8, 1933 (54 I.D. 183). Such continuing consideration of petitioner's application was in effect a reconsideration of the prior administrative rejection thereof in February, 1929, which reconsideration was well within his power. *West* v. *Standard Oil Co.*, 278 U. S. 200, 210, 214.

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[8] Cf. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 774.

The respondent Secretary (R. 111), the trial court (R. 116, 114), and the Court of Appeals (R. 235) each held that petitioner had not exhausted its administrative remedy with respect to its prospecting permit. We respectfully suggest that such holding was in error.

3. This case presents an important question of the administration of Congressional policy embodied in the Leasing Act of February 25, 1920. The announced policy is to encourage discoveries of sodium borates on public lands, and the leasing of such lands, thus providing royalty revenues therefrom (R. 13-14, 95). Respondents' continuing administrative refusal to grant sodium prospecting permits upon public lands favorable for such prospecting but not actually known to contain such deposits tends to discourage prospecting, development and leasing (R. 77) and encourages circumvention of the Act (R. 80). Prospectors in this area, being cognizant of the 22 years of struggle to which petitioner has been subjected, are loath to proceed under the Leasing Act. It is much easier, less expensive and less hazardous for prospectors to proceed under the mining laws. Those who have done so have acquired patent to about 828 acres of sodium borate lands in Sections 24 and 18 (R. 31, 207, 215-218) resulting in the loss of past and future public revenues running into millions of dollars.[9]

The subsurface deposits of sodium borates in the Kramer District (which includes Little Placer) are without surface indication, and are extremely irregular in form and distribution, being present in some places and absent at others nearby. The occurrence of sodium borates beneath any given spot is "utterly unpredictable", and the limits of a deposit can be determined only by underground exploration (R. 14, Ex. 4, R. 102, 213, 214, 78, 141). There is no evidence in the record to the contrary. In this respect these deposits differ from coal, oil, salt and phosphate lands (R. 102). A drill hole 907 feet deep on Little Placer drilled in

[9] See appendix, *infra* p. 18.

1927 failed to disclose the presence of sodium borates. This hole was 100 feet deeper than any known deposit.

Section 24 of the Leasing Act provided that "Lands known to contain valuable deposits" of sodium borates "shall be subject to lease", etc.

Respondents classified Little Placer as "known to contain" sodium borates, and therefore, subject to lease under section 24 rather than classifying it as subject to prospecting permit under section 23. In doing so they

(1) assumed that the statute meant "believed to contain" valuable deposits of sodium borates (R. 58) rather than "known to contain"; (2) failed and refused to recognize the uncontradicted evidence replete in the record to the effect that sodium borate deposits in this area unlike those of other minerals (R. 102) are irregular, sporadic, utterly unpredictable, and can be determined only by underground exploration; and (3) failed to recognize that the requisite fact of whether such deposits, if any, were "accumulated by concentration" could only be determined by a study of subsurface geological conditions actually existing at the location of the deposits.

Only by subsurface prospecting, by drilling and gathering actual information, could such factors be determined.

On June 1, 1928, when petitioner filed its application for a sodium prospecting permit it was not known by what process of nature the sodium borate in the three known deposits was formed. Much less could it be known, how the suspected deposits on Little Placer were formed, if indeed, they were there at all. The question as to whether they were or were not "accumulated by concentration" had not been determined; they hadn't even been found. Congress in effect placed upon the prospector the duty of determining a peculiarly technical fact which was not easy to prove (R. 55) without access to the deposit and without a thorough study of the physical and geological facts. Therefore, Con-

gress directed the Secretary of the Interior to issue a prospecting permit so that the prospector could get those facts and present them to the Secretary.

Respondents acted upon the basis of belief rather than knowledge. There is a wide difference between mere belief and knowledge. *Iron Silver Mining Co.* v. *Reynolds,* 124 U.S. 374, 384; *Sullivan* v. *Iron Silver Mining Co.,* 143 U.S. 431, 442. Where the Secretary of the Interior interprets and applies a statute in a way contrary to its explicit terms, he departs from plain official duty, and the error may be corrected by writ of mandamus directing disposal of the application on its merits, such further proceedings to be in conformity with the proper interpretation of the statute. *Wilbur* v. *Krushnic,* 280 U. S. 306, 319; *Roberts* v. *U.S.,* 176 U.S. 221, 231; *Lane* v. *Hogelund,* 244 U.S. 174, 181.

At the time of filing its application on June 1, 1928 the Secretary was "authorized and directed" by sec. 23 of the Leasing Act "under such rules and regulations as he may prescribe, to grant any qualified applicant a prospecting permit." Petitioner fully conformed to the rules and regulations and was in all respects a "qualified applicant." There were at the time no valid outstanding conflicting claims. If the meaning of the statute is in accordance with its explicit terms petitioner is entitled to the issuance of a prospecting permit as a ministerial act; and respondents' failure to perform such act is subject to judicial correction. *Wilbur* v. *Krushnic, supra.*

4. Section 24 of the Leasing Act (Sec. 262, Title 30, USCA) has from the date of its enactment, specifically provided for issuance, by the Secretary, of sodium leases "through advertisement, competitive bidding, or such other methods as he may by general regulations adopt" etc. The regulations, adopted pursuant to and in conformity with statute, had the force and effect of law. Those regulations, prior to amendment in 1935, had no provision for competitive bidding for leases (R. 95). Respondents' prede-

cessors in office recognized petitioner and one J. C. McMillan as the only persons who would be entitled to a lease of Little Placer in the event U. S. Borax Co. was not entitled to a patent. This is implicit in the contest proceeding involving those three claimants (R. 99) for it would be an idle thing to hold a contest proceeding lasting 30 days to determine the claimant entitled to a lease, and then to deny the lease to the prevailing contestant upon the ground that he must publicly bid therefor against his erstwhile opponents and the rest of the world. Such a contest proceeding would be pointless. No other claimants appeared with respect to Little Placer (R. 99). J. C. McMillan submitted no evidence (R. 208) and failed to appeal (R. 215) or otherwise exhaust his administrative remedy. The claim of U. S. Borax Co. was ultimately declared void *ab initio*. This left petitioner as the only claimant lawfully authorized under the regulations to receive a lease. But respondents, upon reopening as against U. S. Borax Co., the determination arrived at in the contest proceeding, refused to reopen the same determination with respect to petitioner. Respondents clearly had the power to reopen the issue as to petitioner, Little Placer still being in the public domain. *West* v. *Standard Oil Co.*, 278 U.S. 200, 212; *Knight* v. *Lane*, 228 U.S. 6, 13. It was only because of the prior error of the Commissioner and Secretary that the invalidity *ab initio* of the claim of U. S. Borax Co. had not been noticed; and because of that error, that petitioner's application for lease had not been granted.[10] If, as stated in *West* v. *Standard Oil Co., supra,* at p. 220, the Secretary is "the supervising agent of the Government to do justice to all claimants" it was incumbent upon him to reopen the prior determination with respect to petitioner as well as with respect to U. S.

[10] Petitioner, being the first claimant to file upon the land, was entitled to priority (R. 161, 165). U. S. Borax Company's first Federal filing was August 1, 1928, two months after petitioner filed. Its prior location was not a matter of Federal record. McMillan, who filed in December 1928, did not appeal.

Borax Co., and to act upon petitioner's lease application in accordance with the statute and the regulations (having the effect of law) in effect at the time of the filing of petitioner's application for lease. His failure to perform his obligation to do justice is an abuse of discretion.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

ELDEN MCFARLAND,
618 Southern Building,
Washington 5, D. C.

Of Counsel:

J. FRED MCCLERKIN,
618 Southern Building,
Washington 5, D. C.

APPENDIX.

1. Petitioner's application for lease covered also the south half of section 24 (R. 232). The Western Borax Co. had located the south half of sec. 24 in 1926 (R. 73, 76) but that location was void *ab initio* because the prior Smith prospecting permit covering the south half of sec. 24 (as well as Little Placer) was outstanding (*U. S. Borax Co.*, 58 I.D. 426, 443-444, and note 4). This south half of sec. 24 was known to contain sodium borates in 1928 because tincal and kernite had actually been discovered thereon (R. 101). Instead of leasing said lands to petitioner in conformity with the Leasing Act as amended on December 11, 1928, and the regulations applicable thereto, respondents' predecessors in office issued patents thereon to Western Borax Company based upon the void locations.

The Baker locations were also located on the area covered by the Smith oil prospecting permit. Hence, those locations were void also. Ninety-seven per cent of the world's production of borax comes from within a diameter of 75 miles from Little Placer. By issuing patents on these properties at Baker and Western instead of leasing them, millions of dollars in royalties have been lost to the public revenues.

Similarly, the policy of refusing prospecting permits because of the existence of known deposits on adjoining areas has deterred sodium prospecting, for such areas can now be explored only by first taking out a lease, by competitive bidding,—a procedure involving substantial financial commitments which, due to the peculiar nature and uncertainty of deposits, may prove highly unprofitable.

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Sec. 23	2
Sec. 24	3